IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8298 OF 2003

Jaysingrao Krishanrao Patil .. Petitioner.
Vs.
Prakash Raosaheb Patil & Ors .. Respondents.

Mr.Ranjit More with Mr.Umesh Mankapure for the petitioner.
Mr.M.S.Lagu for respondent nos.1 to 8.

CORAM : D.B.BHOSALE, J.

DATED : 2ND NOVEMBER, 2004

ORAL ORDER:

. Heard Mr.More, learned counsel for the petitioner and Mr.Lagu, learned counsel for respondent nos.1 to 8.

2. The petitioner, by this petition under Article 227 of the Constitution of India, has taken exception to the order dated 9.2.1999 passed by the Additional District Judge, Sangli by which he has dismissed the Miscellaneous Civil Application No.59/1994 filed by the petitioner for condonation of delay in filing the appeal against the judgment and decree dated 29.2.1992 passed in Regular Civil Suit No.524/1976. The suit was filed for partition on 18.10.1976. The appeal was lodged by the present petitioner on 15.4.1994 alongwith

Miscellaneous Application No.59/1994.

3. The learned counsel for the petitioner assailed the impugned order on two grounds. Firstly, that the summons in the suit was not served on the petitioner and secondly, that the suit was decreed without passing an order that "the suit be heard exparte" against the petitioner as required under order 9 Rule 6 (2) of Civil Procedure Code. He submitted that the word ‘may’ as appear in clause (a) of Rule 6(2) be read as ‘shall’ to hold that it is mandatory to pass such order.

4. In so far as the first ground is concerned the learned Judge has recorded a categoric finding that the summons was served on the petitioner. The record shows that the petitioner was served on 22.2.1977. The summons alongwith the report of the bailiff and the endorsement of the Nazir of the Court is also on record. I find not reason to interfere with the said finding recorded in the impugned order.

5. In so far as the second ground is concerned, even if it is assumed that the suit was decreed without making an order that "the suit be

heard exparte" as contemplated in clause (a) of Sub-Rule (1) of Rule 6 of Order 9, that will not vitiate the decree. The provisions contained in Order 9 Rule 6(a) provide that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served, the court "may" make an order that the suit be heard exparte. Ordinarily, the word "may" is not a word of compulsion. It is enabling word and it only confer power on authority and imply a discretion. It is normally used in a statute to indicate that something may be done which prior to it could not be done. The word "may" in clause (a) of Rule 6, in my opinion, is only an enabling or permissive power in the sense it only confers a power or authority and imply discretion to proceed to hear the suit exparte. It confers a power on a court to be exercised in the circumstances pointed out in Rule 6(a). Once it is proved that the summons was duly served, the court may proceed to hear the suit exparte. The trial court, however, must ensure that the defendants have wilfully remained absent in spite of knowledge of the suit and proceed exparte, only after the stage of hearing has reached and not before that. Therefore, in a case where the summons was duly served and the defendant

did not appear at all till the stage of hearing of the suit and if the court proceeds to hear the suit without passing a formal order that "the suit be heard exparte" would not vitiate the decree. In any case, the word "may" in clause (a), in my opinion, cannot be construed to mean "shall" or "must" as tried to be contended by the learned counsel for the petitioner.

. In the present case the petitioner did not appear at all, though, served. He cannot make a grievance that such order was not passed. Moreover, there were about 20 defendants in the suit including father of the petitioner, and the suit was going on for more than 20 years. Keeping that in view, in my opinion, the learned Judge has rightly rejected the miscellaneous civil application seeking condonation of delay for the reasons recorded in the order. I find no reason to interfere with the impugned order which in my opinion is just and proper. The writ petition, therefore, fails and is dismissed as such.

(D.B.Bhosale, J.)